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# In the Supreme Court of the United States

SUPREME COURT, U.S.
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OCTOBER TERM, 1971

IRVING GARBER, PETITIONER

*v.*

UNITED STATES OF AMERICA

ALAN FLORES, PETITIONER

*v.*

UNITED STATES OF AMERICA

PAUL M. KAUFMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

STEVEN G. BURNS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 567

IRVING GARBER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 574

ALAN FLOREA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 576

PAUL M. KAUFMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 719

STEVEN C. BURNS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINION BELOW

The opinion of the court of appeals (Garber Pet., No. 567, App. A1–A15) is reported at 429 F. 2d 240.

## JURISDICTION

The judgment of the court of appeals was entered on July 22, 1970. Mr. Justice Harlan in the case of Burns extended the time for filing a petition for a writ of certiorari to September 19, 1970, and on that date his petition was filed. The other petitioners filed their petitions on August 20, 1970 (Garber) and August 21, 1970 (Florea and Kaufman). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

The following questions are presented in these four petitions by the defendants at a common trial for conspiracy and securities fraud:

1. Whether the evidence supports the verdict (Florea, Kaufman, Burns).

2. Whether certain evidentiary rulings, including limitations on cross-examination were proper (Florea, Kaufman, Burns).

3. Whether certain documentary evidence, including the required business records of a broker, a daily account of stock distribution, and analyses of the daily account made by an accountant, was properly received (Garber, Florea, Burns).

4. Whether the court's instructions in certain particulars were accurate and fair (Florea, Kaufman).

5. Whether it was proper, at the request of a co-defendant, months before trial, to disqualify Burns' retained counsel, whose firm had previously represented a co-defendant in the criminal matter that was the subject of the instant trial (Burns).

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, each petitioner was convicted of conspiracy to violate the anti-fraud provisions of the Securities Act of 1933, and petitioners Kaufman and Burns were also convicted of the substantive offenses of sending confirmations of fraudulent stock transactions through the mail, in violation of 18 U.S.C. 371 and 15 U.S.C. 77q(a) and 77x.[1] On July 29, 1969, petitioner Garber was sentenced to three months' imprisonment and fined $1,000; petitioner Florea was given a suspended sentence of four months, placed on probation for two years and fined $1,500; petitioner Kaufman was sentenced to nine months' imprisonment on each of twelve counts (to be served concurrently, with the imprisonment on all but the first count suspended), placed on probation for two years after release from imprisonment, and fined $2,000 on each count, for a total of $24,000; and petitioner Burns was sentenced to four months'

[1] A fifth defendant (Seigenfeld) who stood trial with petitioners, was acquitted. Initially, ten defendants were named in the indictment but some pleaded guilty before trial or were otherwise granted a severance from the five tried in the present case. Of the seventeen counts, twelve went to the jury.

imprisonment on each of five counts (to be served concurrently, with the imprisonment on all but the first count suspended), placed on probation for two years after release from imprisonment, and fined $1,000 on each count for a total of $5,000.

The evidence showed that in May 1963, Daniel Kroll, a past president of Donbar Development Corporation, owned a large block of unregistered stock in that corporation which he was unable to sell at the then current over-the-counter market price (App. 105–106).[1] He decided to deposit a significant portion of his stock with one broker (Lee) with instructions to sell at $4 per share or higher, approximately $1 above the then current market price, and to use other brokers to create a market for the shares at the same price (App. 116–117). Kroll's method of creating a market for Donbar shares included support for the price, so that it would not drop below $3.50 per share. He thereafter had various nominees of his, acting through petitioner Garber's brokerage firm (Nassau Securities), buy Donbar stock at prices over $3.50 (App. 127–128).

Kroll furnished the money for these support purchases and promised to protect Garber and his nominees against loss (App. 117–118, 127, 129, 587). Having thus raised the market price by approximately $1 per share, Kroll agreed to pay $1 per share to other brokers, such as petitioner Burns, to buy shares from

[1] "App." refers to the eleven volume appendix of petitioners Kaufman and Burns of the proceedings before the district court. We are lodging this appendix with the Clerk of this Court.

the supply he owned (App. 110, 241, 251–252, 1748, 1939, 1983). The brokers would buy the shares either for their own accounts (App. 4094, 4147), hoping for a profit in addition to the $1 per share bonus for buying, or for the accounts of customers whom they could persuade to take the stock. The customers were not told of the temporary price support nor of the extra cash compensation that Kroll was furnishing (*e.g.* App. 1736, 1755, 1839, 1950, 1962, 1971–1972).

Petitioner Florea was a registered representative with a brokerage company (Richter); his function in the Donbar enterprise was as a "finder" of brokers, whom he would introduce to Kroll and Kroll's associate, one Binstein,[1] with a view to their participation in the contemplated "corner" of Donbar stock (App. 130–133). For this service, Florea demanded and received compensation based on Binstein's record (Govt. Ex. 1) of the number of Donbar shares these participating brokers bought (App. 155–156, 164, 192–193, 481, 483, 487, 498, 568, 1557–1561).

Important to the success of the selling of Kroll's block of shares was a time limitation on the reselling of Donbar shares imposed on the participating brokers to prevent the market from collapsing (App. 150). The enforcement of this restriction was the responsibility of petitioner Garber (App. 584, 587, 1553), but some prompt reselling nevertheless ensued. As a result,

[1] Binstein, a government witness at trial, was not indicted for his part in the Donbar distribution, but was awaiting sentence on another stock fraud charge to which he had pleaded guilty (App. 103).

Kroll went to his attorney, petitioner Kaufman, for help (App. 245). Kaufman introduced Kroll to broker clients of his law firm, such as petitioner Burns, who were agreeable to participation in the disposition of the Donbar stock (App. 245–246, 1745). Some of these brokers preferred to receive their secret $1 per share compensation direct from Kroll or Binstein (App. 1834), but petitioner Burns had petitioner Kaufman[4] act as the escrow agent for the multi-thousand dollar payments paid to Burns for his work (App. 247–248, 735–737, 858–859, 1578).

In buying stock for the accounts of their customers in Donbar Development, the brokers sent confirmations of the purchases by mail (*e.g.* App. 1854–1855, 1859, 1861, 1951, 1962, 1972, 1992).

The activity in Donbar stock lasted approximately three weeks, ending the first week of June 1963 (App. 438, 563).[5] By the third week of June, the price of the Donbar shares had fallen from $4.50 a share to a price range of $1.50 to $2.00 (App. 278, 890).

## ARGUMENT

1. Florea, Kaufman, and Burns each assert that, as to himself, the evidence was insufficient to support the verdict of guilty.

*a. Florea:*

Petitioner Florea contends that if he was guilty of anything, it was only of finding brokers who would

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[4] Kaufman sought compensation from Kroll by boosting the legal fee he charged Kroll for his work in an unrelated matter (App. 280–285).

[5] Kroll died in August 1963 (App. 285).

buy Donbar stock for their own profit and there was no evidence to show that he was aware of a conspiracy to sell the stock fraudulently to the public or knew that the mails would be used in furtherance of the fraud (Florea Pet. 5, 11–12, 13–15). The record, however, belies these contentions. When Florea was told of the proposed scheme to raise the Donbar price and agreed to join it, it was explained to him by Binstein that brokers were to buy the shares for their "clients" or their own trading accounts, with the stock so purchased "to be put away, not to be sold immediately thereafter, immediately after buying" (App. 149). Florea then told a fellow broker, co-defendant Seigenfeld, that money could be made in Donbar stock "for customers" as well as by a broker trading for his own account (App. 4179). Thus, it is clear that Florea knew that the public would be involved in advancing the price of the stock. As for the claimed ignorance of the use of the mails, the jury could permissibly infer from the fact that, as an experienced registered representative in the securities business (App.

[6] Florea also claims that his prosecution was barred by the running of the five-year statute of limitations. He states that he entered into the agreement in May, 1963 and his efforts terminated then, but he was not indicted until June 3, 1968. Whether he continued as a member of the conspiracy until June 3, 1963 and thereafter was a factual question submitted to the jury (App. 4708–4709, 4712). The evidence showed that sales were made to the public by his fellow conspirators as late as June 6, 1963 (App. 2195, 3449). Since the offense was a continuing one, designed to take stock out of circulation for a period of time after the last sale, the statute had not run by June 3, 1968. See *Grunewald* v. *United States*, 353 U.S. 391.

3225, 3237). Floren knew that brokers customarily mailed confirmations of purchases to their customers and would do so in connection with the Dunbar scheme. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Bridges*, 326 F. 2d 680, 684 (C.A. 8).

*b. Kaufman:*

Petitioner Kaufman contends (Kaufman Pet. 4–13) that the evidence was insufficient to convict him of either the conspiracy charge or the substantive counts of aiding and abetting the stock brokers in perpetrating frauds on their customers. As stated above, *supra*, pp. 5–6), however, when petitioner Garber proved unable to control his fellow brokers, Kroll sought and obtained the help of his attorney, Kaufman, who was experienced in the securities regulation field and had many brokers-dealer clients (App. 1326, 2879, 3276). Binstein testified as to Kaufman's efforts to introduce Kroll to various brokers and as to Kaufman's role as escrow agent for Burns' secret payments. Other brokers also testified that they first heard of the plan for disposing of Dunbar stock from Kaufman, and that he also offered to act as escrow agent for their secret payments from Kroll (App. 1394, 1713, 1718, 1768, 1831). From these facts, the jury was warranted in finding that Kaufman both participated in the conspiracy and aided and abetted Kroll and others.

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Kaufman also urges (Pet. 16) that his convictions under the conspiracy and substantive counts should be mutually exclusive. It is, however, settled that aiding and abetting and conspiracy involve distinct elements and are distinct offenses. *Pereira* v. *United States*, 347 U.S. 1, 11–12.

Kaufman also contends (Kaufman Pet. 13–14) that the mailing of confirmation slips to customers who purchased Donbar stock did not constitute a use of the mails in furtherance of a fraudulent scheme, an element required for conviction under the instructions given to the jury.

Confirmation slips, however, are not simply courtesy notices. Before stock is delivered to a buyer, the confirmation notice must be sent out to enable the buyer to settle his account by the date indicated. Thus, confirmations are in effect bills calling for payments of the purchase prices indicated on the slips (see App. 1265–1266, 1311–1312, 1320, 1563, 2118, 3049, 4480). The jury was clearly warranted in finding that use of the mails to send out the confirmations was in furtherance of the conspiracy.

*c. Burns:*

Burns, a stock broker, claims that he had no knowledge of the market rigging of the price of the Donbar shares (Burns Pet. 6) and that the evidence that he sold the shares without disclosing the receipt of the secret payments of $1 per share was insufficient (Burns Pet. 7, 10, 11). Binstein testified, however, that after Kaufman had agreed to find brokers for the Donbar distribution, Kaufman named Burns as a broker with whom he had a "close relationship" and who could be depended upon to sell all the remaining Donbar shares (App. 245). Petitioner Burns later confirmed this claim of "retailing power" in a conversation with Binstein, when Binstein called on Burns to confirm Kaufman's arrangements (App.

247). Burns insisted at this time that his bonus money be paid in advance to Kaufman (App. 247), and Binstein thereafter on one occasion gave Kaufman $4,000 for Burns (App. 248). Halperin, an assistant of Binstein, also delivered an envelope with cash to Kaufman (App. 1064). This evidence of Burns' guilt was augmented by an accidental meeting he had with Binstein in 1967 while the Donbar distribution was under investigation during which Burns told Binstein that he had nothing to worry about and warned: "If you know what's good for you, just keep your mouth shut" (App. 275–276). The evidence thus clearly supported the finding of Burns' complicity both as to the conspiracy and substantive offenses.

2. Petitioners Florea, Kaufman and Burns also contend that certain evidentiary rulings, including limitations on cross-examination were prejudicial as to them.

*a. Florea:*

Florea asserts (Florea Pet. 17–27) that he should have been permitted to interrogate Binstein and co-defendant Seigenfeld more fully. It is claimed that restrictions by the court prevented any inquiry as to why Binstein was not indicted in the instant case and whether he hoped to avoid punishment on another stock fraud charge, and precluded full examination of Binstein's current business interest in a profes-

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The jury was instructed that this statement was to be considered solely as evidence against Burns (App. 277).

It was, of course, not necessary to prove that petitioner was a member of the conspiracy from its inception. *Blumenthal v. United States*, 332 U.S. 539, 557.

sional basketball league franchise (Florea Pet. 18–21). Contrary to this contention, these matters were either brought out on cross-examination or concerned matters outside the issues at trial.[10] Binstein, for example, testified that his cooperation with the government was not based on any promise that he would not be indicted for the Donbar transactions (App. 682); he stated that he hoped he would not be sentenced to imprisonment or would receive a suspended sentence on an unrelated stock fraud charge to which he had pleaded guilty (App. 103, 397–398, 473). Binstein also testified that he had told league officials of his guilty plea to a felony (the stock fraud) and had been informed that he was not as a result barred by league rules from holding an interest in a franchise (App. 472). The defense had ample opportunity to show Binstein's past lies and evasions, his profit from the Donbar distribution, and to question other witnesses as to his reputation of being a "born cheat" (App. 344, 350, 430, 432, 444; 401, 757; 1558).

Seigenfeld's counsel at trial asked that his client and one Richter, both officers of a stock exchange firm for which Florea had worked, not be cross-examined as to administrative sanctions which had been imposed on them by stock exchange authorities, unless government counsel or counsel for other defendants first explained to the court at a side bar conference

[10] The profitability of a public offering of stock in the basketball franchise, completed after the verdicts were returned in the instant case (Florea Pet. 20–21), could not have been known weeks earlier when Binstein testified and at a time when the registration statement for such offering had not been filed.

Florea's claim that this restriction was error (Florea Pet. 23–27) is without merit as no counsel made an effort to inquire as to these administrative sanctions and the court had not forbidden such inquiries.

*b. Kaufman:*

The trial court sustained an objection to a question asking Binstein where he lived and where his children lived (App. 308–309). Petitioner Kaufman urges this as error. However, *Smith v. Illinois*, 390 U.S. 129, upon which he relies, requires reversal only where the lack of name and address of a witness denies a defendant an opportunity to cross-examine *effectively*. Where a defendant is not hampered in his cross-examination, no confrontation right is infringed. *United States v. Lawler*, 413 F. 2d 622, 627 (C.A. 7), certiorari denied, 396 U.S. 1046; *United States v. Lee*, 413 F. 2d 910, 915 (C.A. 7), certiorari denied, 396 U.S. 1022.

In the present case, Binstein testified as to his marriage and number of children and that he lived in New Jersey. He also testified as to his current occupation (App. 308–311). The court offered to hold a sidebar conference if counsel had any reason to want specific information as to the place of residence of Binstein; but no counsel sought such a conference (App. 309). At all events, counsel had no trouble "in identifying the witness with his environment" (Kaufman Pet. 17). He was shown to be a person of some prominence in professional basketball circles and counsel for a co-defendant was able to identify him

(App. 608–614).

Kaufman also urges that it was error to allow testimony showing that Florea had participated in another crime not covered by the indictment and to strike character evidence offered in Kaufman's behalf (Kaufman Pet. 19–20, 21–23). The witness, Mrs. Gold, did not implicate Florea in another crime as petitioner Kaufman asserts. She stated that as part of the Donbar distribution, Florea sought compensation from Binstein for the buying activities of a broker, Dietz[11] (App. 1561). Since this dealing with Dietz was part of the Donbar transaction and since Florea does not presently complain as to this evidence, petitioner Kaufman has no cause for complaint.

As to the other point, a New York jurist (Judge Heller) testified that he was not familiar with Kaufman's reputation among those who knew him (App. 2305). Since the jurist did not know of that reputation, his evidence was properly ruled inadmissible. See *Michelson* v. *United States*, 335 U.S. 469, 472.

*c. Burns:*

Petitioner Burns states that the court erred by admitting hearsay statements of alleged co-conspirators before establishing by independent evidence the existence of the conspiracy and Burns' participation therein (Burns Pet. 10, 16–18). As Binstein, the first witness, gave evidence which showed that Burns knew of the conspiracy and was a member of it (App. 247,

[11] Dietz was named as a co-conspirator in the indictment, but his case was severed because of his health (App. 20–22).

735, 858–859, 1960, 1970, 1971). Burns' testimony is simply that it was error to admit the portions of Binstein's testimony which preceded the testimony connecting Burns with the conspiracy. But as Binstein's testimony, which was given in chronological order, showed in its entirety that petitioner Burns was a member of the conspiracy (see *Glasser* v. *United States*, 315 U.S. 60, 74), it is plain that a timely foundation was laid for the admission of all of the co-conspirator declarations. See *Lutwak* v. *United States*, 344 U.S. 604, 607.

3. Petitioners Garber, Florea and Burns contend that certain items of documentary evidence were improperly received.

*a. Garber:*

Petitioner Garber contends that the compelled production of records of his company (Nassau Securities) before the grand jury violated his privilege against self-incrimination (Garber Pet. 3–9). He relies on *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, *Marchetti* v. *United States*, 390 U.S. 39, and similar cases, in which it was held that certain required information was violative of defendants' rights against self-incrimination. In those cases, however, the Court's rationale depended on the fact that the information was demanded of a group inherently suspect of criminal activities. By contrast, stock brokers are not as a group criminally suspect and the purpose of requiring them to record their transac-

tions[12] is to insure orderly business dealings and to promote commerce and collect transfer taxes. This Court has held that in these circumstances individuals may be required to produce their business records for use in a criminal proceeding. *Shapiro* v. *United States*, 335 U.S. 1;[13] see *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76.

*b. Florea and Burns:*

Florea and Burns claim that Binstein's record (Government Exhibit 1) with its daily entries recording purchases, sales and prices of the Donbar stock owned by Kroll during the May-June 1963 operation, and the secret payments to the brokers (App. 120–127) should not have been received. They also urge that the analyses of that exhibit made by Kroll's accountant Braun[14] on or shortly after June 11, 1963 (Government Exhibits 401–406), were inadmissible because Braun used oral information from Kroll and Binstein to sup-

[12] Securities and Exchange regulations require retention of records of securities transactions for six years. 17 C.F.R. 240.-17a–4(a).

[13] *Shapiro* was expressly distinguished in *Marchetti*, *supra*, 390 U.S. at 56–57 and *Haynes* v. *United States*, 390 U.S. 85, 98–99.

[14] Braun was called as a defense witness to contradict Binstein's testimony (App. 120–121, 404) that Braun had "set up" the form that Binstein used (Govt. Ex. 1). Braun testified that he had not done so, that he first saw the form on June 11, 1963, and that he then prepared analyses of sales, purchases and advances of the Donbar transactions (App. 3394–3395, 3400). On cross-examination, Braun was questioned concerning these analyses and Government Exhibit 1.

plement the information contained in Government Exhibit 1 (Florea Pet. 28–36; Burns Pet. 8–10, 15–17).

Both Government Exhibit 1, made by Binstein, and the six analyses (Government Exhibits 401–406), made by accountant Braun were stated by each maker to be accurate records and to have been prepared contemporaneously with the events recorded or within a reasonable time thereafter (App. 120–121, 3446, 3481, 3487, 3497, 3752). Since they were business records designed to effect an accounting as to funds expended and proceeds received based on the Donbar stock distribution (see App. 3468, 3480, 3483), the indicia of reliability surrounding their making furnished a "circumstantial guarantee of trustworthiness" and rendered them admissible. See *United States* v. *Hickey*, 360 F. 2d 127, 143 (C.A. 7), certiorari denied, 385 U.S. 928; 28 U.S.C. 1732. Exclusion was not required on the grounds that the entries were based on oral reports received from others, that the transactions recorded were illegal, or that the records were intended to be confidential. *Grillo* v. *United States*, 336 F. 2d 211, 213 (C.A. 1), certiorari denied *sub nom. Gorin* v. *United States*, 379 U.S. 971; *United States* v. *Re*, 336 F. 2d 306, 312–313 (C.A. 2), certiorari denied, 379 U.S. 904; *United States* v. *Cohen*, 384 F. 2d 699, 701 (C.A. 2); *Pritchard* v. *United States*, 386 F. 2d 760, 768 (C.A. 8), certiorari denied *sub nom. Borchelt* v. *United States*, 390 U.S. 1004. Nor were the records of Binstein and Braun required to be complete or maintained in the most efficient manner to make them admissible. *Johnson* v. *United States*, 325 F. 2d 709, 711 (C.A. 1);

*United States* v. *Kelly*, 349 F. 2d 720, 774 (C.A. 2), certiorari denied, 384 U.S. 947.[15]

4. Petitioners Florea and Kaufman question the accuracy and fairness of certain portions of the court's instructions to the jury.

*a. Florea:*

The court initially instructed that the defendants were alleged to be members of a conspiracy to use the mails and other means of interstate commerce in an effort to defraud (App. 4720). Later, while instructing as to the substantive offenses charged, the court noted that, since the government was relying on the use of the mails, such use had to be found by the jury "even though the indictment" mentioned the use of other means of interstate commerce (App. 4758). Florea asserts that this instruction was insufficient to alert the jury to the requirement that, as to the conspiracy count, it had to find a use of the mails in an effort to defraud (Florea Pet. 13–15). But any doubt in this regard was allayed by the supplementary instruction to the jury, after the jury had

[15] At all events, these records were merely cumulative. Binstein testified he made payments to Florea after Florea had agreed to enlist willing brokers (App. 155). As to Burns, Binstein testified as to his conversation with him (App. 257); and that this record showed 4,000 share blocks of Donbar stock as bought by Burns (App. 253). In addition, Burns' cashier at his brokerage concern, without objection from Burns' counsel, authenticated his records relating to his purchases and sales of Donbar stock (App. 1717–1722), and various customers of Burns testified that they bought Donbar stock from him in June 1963, without being informed of the temporary price support being given to the stock nor the secret bonus money being given to their broker (*e.g.* App. 1959–1962, 1970–1972).

requested further instructions regarding the conspiracy count, that the government was "relying on the use of the mails only" (App. 4859).

Florea also questions the propriety of another instruction, stating that a supplementary instruction did not make it clear that the overt act which the jury had to find was committed on June 3, 1963, or thereafter (because of his statute of limitations defense at trial) was one which had to "be in furtherance of the conspiracy alleged" (Florea Pet. 16). The supplementary instruction did not use the word "furtherance" but did state that the jury had to find that at least one of the overt acts alleged by the government occurred or was committed on June 3, 1963 or thereafter (App. 4860). The jury had been previously informed that such acts must have been performed in furtherance of some object or purpose of the conspiracy charged (App. 4722). Since the supplementary instruction was focussed on the statute of limitation defense (App. 4859), it was not necessary to repeat the entire previous instruction dealing with overt acts. Moreover, a court's charge is to be read in its entirety. *Boyd* v. *United States*, 271 U.S. 104, 107; *United States* v. *Hamilton*, 420 F. 2d 1096 (C.A. 7). Accordingly, it is clear that petitioner Florea suffered no prejudice from the instructions given.

*b. Kaufman*:

Kaufman asserts that in answering two inquiries from the jury, the court erred by its "apparent affirmance" of his guilt (Kaufman Pet. 24–28). A read-

ing of the replies shows the contrary. During deliberations, the jury sent two notes to the court which indicated that it was troubled by petitioner Kaufman's relationship as an attorney with other conspirators. It asked to be informed if mere knowledge of a conspiracy would impose a duty to report the conspiracy, and whether such knowledge or the negotiating of a contract between conspirators would result in an attorney becoming a member of the conspiracy (App. 4870, 4902). The court instructed that the charges had nothing to do with a lawyer defendant hearing about a conspiracy and failing to report it; that the case involved a government contention, denied by Kaufman, that Kaufman was a knowing participant (App. 4874–4875). As for a lawyer negotiating a contract, the court instructed that only if the jury found that the lawyer knew a conspiracy existed and then negotiated a contract to "assist and further that conspiracy" would a lawyer "become a knowing and wilful member of the conspiracy" (App. 4904–4905). Clearly, the replies given were accurate and responsive. Petitioner's characterization of the replies as being "an unfair invitation, if not direction, to convict petitioner" (Kaufman Pet. 27) is completely unfounded.

5. Petitioner Burns asserts that he was harmed by a pretrial order which, to avoid a possible conflict of interest with co-defendant Seigenfeld, required him to retain counsel other than the counsel he had selected (Burns Pet. 12–14, 19–20). The evidence shows that during the 1967 investigation that led to the in-

dictment, Seigenfeld was represented by two attorneys, a Mr. Wolpin and a Mr. Certilman, members of two different law firms (App. 5189–5190). After the indictment was returned, Seigenfeld retained Mr. Wolpin exclusively. Subsequently, Burns retained Mr. Certilman's firm (Wofsey) to defend him (App. 5190).[16] Mr. Wolpin objected that such representation of Burns might result in the divulgence of confidences made by Seigenfeld to Mr. Certilman while Seigenfeld was a client of the Wofsey firm (App. 5190, 5192, 5195). Government counsel also urged that the Wofsey firm should withdraw from its representation of Burns, relying on Canon 37 of the Canons of Professional Ethics which forbids representation which may result in the disclosure of the confidences of a client (App. 5208). The Wofsey firm protested (App. 5209, 5211, 5234), but the court ordered it to withdraw. (App. 5212, 5215). Prior to the date of that order, Burns had retained a Mr. Brodsky to serve as trial counsel, with the Wofsey firm to supply "expertise in securities matters" (App. 5203, 5253).[17] After the order in January 1969, Mr. Brodsky became sole counsel and thereafter represented Burns at the trial which commenced on May 5, 1969 (App. 2a). It is not

[16] The firm had represented Burns in civil matters for some prior years (App. 5248, 5263).

[17] Contrary to petitioner's claim (Burns Pet. 13), none of the partners of the Wofsey firm who made affidavits (in support of a writ of mandamus to permit them to continue to represent Burns) claimed that they represented Burns during the investigation which led to the indictment or that after the indictment, they did "extensive preparation" work in his defense (see App. 5263, 5269).

known what Seigenfeld may have told his former counsel, but Seigenfeld's trial counsel obviously contemplated having Seigenfeld testify in his own behalf (which he did) and he professed to fear a hostile cross-examination of his client by Burns' counsel. In view of such possibility, the order of disqualification of the Wofsey firm was not error. See *United States* v. *Trafficante*, 328 F. 2d 117 (C.A. 5); *Chugach Elec. Ass'n.* v. *United States D.C. for District of Alaska*, 370 F. 2d 441 (C.A. 9), certiorari denied *sub nom. Roderick* v. *Chugach Elec. Ass'n.*, 389 U.S. 820. Nor does it appear that petitioner was harmed by such disqualification in view of the earlier retention of Mr. Brodsky to serve as the trial counsel.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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